a civil case, but rather, the South Carolina Supreme Court's retroactive construction of a criminal statute which violated the constitutional requirement of definiteness, and the underlying principle that a person of ordinary intelligence should be given fair notice that the contemplated conduct was forbidden by statute made it criminal to enter onto property after being given fair notice prohibiting the entry. The Supreme Court interpreted a trespass statute to apply to both entry onto land and remaining on the property. It was this reinterpretation which violated a criminal due process right, and was the subject of the Supreme Court's decision. In the case at bar, there is no allegation of a change in the interpretation of a criminal statute which would deprive the Petitioners of their due process rights.

The Petitioners also cite *Adams v. Robertson*, 520 U.S. 83 (1997) for the proposition that this Court could consider an appeal from a state court decision when there was a failure to raise a Federal question before the Alabama Supreme Court. In *Adams* the Court held that since the Petitioners failed to establish that they properly presented the alleged violation of the Fourteenth Amendment due process clause to the Alabama Supreme Court, the United States Supreme Court would not reach the issue presented, and dismissed the Writ of *Certiorari* as improvidently granted. When the state's highest court is silent on a Federal question, it is assumed that the issue was not properly presented. *Id.* at 86. The only exception is when the aggrieved party establishes that the state court had a "fair opportunity to address the Federal question that is sought to be presented" to the United States Supreme Court. *Webb v. Webb*, 451 U.S. 493, 501 (1981). The Virginia Supreme Court was silent on any Federal question. The Petitioners have not attempted to overcome the presumption that the Federal

question was not presented to the Virginia Supreme Court.

None of the cases cited by the Petitioners support a finding of jurisdiction merely because of a varied interpretation of a rule of law by a state's highest court. For example, in *Bush v. Gore*, 531 U.S. 98, 115 (2000), (Renquist, CJ concurring) the opinion did not consider whether or not the United States Supreme Court had jurisdiction under 28 U.S.C. § 1257. In *Wright v. Georgia*, 373 U.S. 284, 289-291 (1963), the alleged violation of the Fourteenth Amendment was presented at the trial court and before the Georgia Supreme Court. In *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458 (1958), the Federal questions had been raised to the Supreme Court of Alabama. In *United States v. Lanier*, 520, U.S. 259, 266 (1997), the question was presented as to whether there was a violation of 18 U.S.C. § 242 for criminally violating the constitutional rights of five women by assaulting them sexually while the respondent served as a state judge. The question before the Court was whether or not there was fair warning or notice of what the law intended. No issue was raised as to the Court's jurisdiction to decide Federal questions. Finally, in *Marks v. United States*, 430 U.S. 188, 191-192 (1977), there was an appeal of a conviction of the transporting obscene materials in violation of Federal law, and a question of the retroactive application of a new standard for defining pornography. Again, there was no question raised as to whether or not the Court had jurisdiction under 28 U.S.C. § 1257.

C. The Doctrine Of Partnership By Estoppel Or Implied Partnership Is Not Applicable To Tort Actions.

The Petitioners argue that the trial Court and the

Virginia Supreme Court should have considered the existence of a partnership by estoppel in the Petitioners' effort to hold additional entities liable on the contract claims and other claims. In Virginia, the existence of a partnership by estoppel is controlled by Va. Code § 50-73.98:

> "A. If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported person's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation." (emphasis added.)

The statute is an adaptation of the common law, which also provided that parties are estopped from denying a partnership where they hold themselves out as partners

and a third party reasonably relies on the representations to its detriment. "In order for the third person to be liable as a partner on the ground of estoppel, two things must be proven: (1) the act of holding out must have been done either by him or with his consent; and (2) such holding out must have been known to the party seeking to avail himself of it and credit given on the faith of it." *Hobbs v. Bank*, 147 Va. 802, 841, 128 S.E. 2d 46 (1926); *Cooper v. Knox*, 197 Va. 602, 607, 90 S.E. 2d 844 (1956). The concept of partnership by estoppel requires an element of reliance, and there can be no reliance in the existence of a partnership for tort based allegations.

> "The only theory under which a person who is not a partner in a partnership with other persons can be held liable as a partner with others to a third person is on the basis of estoppel, although this principle of law can only be relied upon by third parties, by his own conduct, the person who is not a partner represents himself or allows himself to be represented to a third person as being a partner, and the third party relying on such representation of conduct gives credit to the supposed partnership... This doctrine of estoppel in such cases is not applicable to purely tort actions, because the third party in such cases is not injured as a result of any conduct on the part of the person he is attempting to hold as a partner in connection with a negligent act on the part of another person or persons. It can only be used in connection with a contract or where credit is given in reliance on such conduct..."
> [citations omitted.]

Pruitt v. Fetty, 148 W. Va. 275, 279-280, 134 S.E. 2d 713,

716-171 (1964).

Even if the Court were to find a partnership by estoppel, Diane Cox Basheer Communities, Inc. would only be liable for the breach of contract and warranty claims, which have now been dismissed with prejudice. The Petitioners cannot recover against the alleged partnership, when the Court has entered a final judgment against the alleged agent for the partnership. *See Santen v. Tuthill*, 265 Va. 492, 578 S.E. 2d 788 (2003); *Roughton Pontiac Corp. v. Alston*, 236 Va. 372 S.E. 2d 147 (1988).

The only "partnership" that was alleged did not include the named seller on the contract. When asked by the trial court the allegations a partnership existed, Petitioners' counsel pointed to Exhibit B to the Amended Motion for Judgment. (Tr. p. 15). The seller is not one of the entities identified in the exhibit as a "partner". Even if a partnership existed, the "partnership" was not part of the sale.

D. The Petitioners Fail To State Any Cause Of Action Against Defendant Diane Cox Basheer Communities, Inc.

A Demurrer will be sustained by the Court if a plaintiff fails to sufficiently plead a cause of action against a defendant, when all properly pled facts are taken as true. *Ward's Equipment, Inc., et.al. v. New Holland North America, Inc.*, 254 Va. 379, 382, 493 S.E. 2d 516, 518 (1997). In considering a demurrer, a court will draw all inferences from the facts alleged in favor of the non-moving party, but "a demurrer does not admit the correctness of the pleader's conclusions of law." *Id.* Petitioners must allege facts sufficient to state a case of action. Va. Code § 8.01-273. The record makes it clear that the Court only looked at the allegations in the

Amended Motion for Judgment, and the exhibits thereto.

Despite the fact that the agreement entered into by the Petitioners states on its face that it is with Basheer/Edgemoore-Southampton, L.L.C., the Petitioners attempt to impose liability against Diane Cox Basheer Communities, Inc. by arguing that the two entities are members of a general partnership doing business under the trade name "Basheer & Edgemoore." Although Diane Cox Basheer Communities, Inc. is not mentioned or identified anywhere in the agreement signed by the Petitioners, the Petitioners allege that the partnership exists because the entities allegedly hold themselves out to be a general partnership "in advertising, marketing, construction, sharing of employees, sharing of contractor licenses, and prolific use of the trade name 'Basheer & Edgemoore'." (Amended Motion for Judgment, ¶ 7). Petitioners' specific allegations related to documents reviewed **after** the contract was signed.[5] The Petitioners cannot now claim reliance on the existence of a partnership they learned about after the contract was signed.

The contract was for the sale of the property, was fully endorsed by the Petitioners, and explicitly states in the first paragraph that the contracting party is "Basheer, Edgemoore- Southampton, L.L.C." A limited liability company in Virginia is an identifiable entity, and its liabilities and composition are determined by statute. The Petitioners attempt now to impose liability against a "partnership" in the face of clear and unambiguous language to the contrary in the contract. Factual allegations in pleadings must be disregarded if they "are

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[5]Compare the contract dated May 20, 2000, with the letter allegedly showing a partnership dated four days later on May 24, 2000.

refuted by the terms of the authentic, unambiguous documents that are a part of the pleadings." *Ward's Equipment, Inc. et al. v. New Holland North American, Inc.*, 254 Va. 379, 384, 493 S.E.2d 516, 519 (1997). The sales contract was attached to the motion for judgment as Exhibit 1, and any allegations made by the plaintiff that a partnership, or any entity other than Basheer/Edgemoore- Southampton, L.L.C., was liable on the contract were refuted by the contract, and should not be considered. Any documentation or statements made after the contract was entered into by the Petitioners are irrelevant. The Petitioners were aware at the time of contracting that they were purchasing a home from one entity only; that is, Basheer/Edgemoore- Southampton, L.L.C.. The Petitioners may not now attempt to change the clear wording of the contract to impose liability on uninvolved entities.

There can be no reliance, as a matter of law, on alleged misrepresentations concerning the identity of a party to the contact, when the contract expressly identifies the parties. In *Board of Directors of Carrdinal Place Condominium v. R. Carr Homes Partnership, et.al.*, 58 Va. Cir. 602 (2000), Judge Alden of the Fairfax Circuit Court held that as a matter of law, in granting a Motion for Summary Judgment, the plaintiff did not allege misrepresentations as to the identity of the seller, when the seller was identified in the contract. There could be no reliance on any misrepresentations or statements prior. Likewise, there could be no reliance by the Petitioners here that they entered into a contract with a non-existent partnership not identified in the contract.

The Virginia Supreme Court has held that the term "partnership" itself is not sufficient to establish a legal partnership or to impose the liabilities of a partner

on a second party. In *Kennedy v. Mullins*, 155 Va. 166, 154 S.E. 568 (1930), the Supreme Court of Virginia stated that "if the terms of the contract existing between the parties do not constitute a partnership, none will be declared, even though the parties in words call the arrangement one." *Id.* at 173, 570. Under this precedent, the fact that correspondence provided to the Petitioners states in general terms that "Basheer & Edgemoore" is a partnership with Diane Cox Basheer Communities, Inc. and Edgemoore Homes is insufficient to impose liability against Diane Cox Basheer Communities, Inc.

The Petitioners have not alleged that Diane Cox Basheer Communities, Inc. nor any other entity have joined together "their money, goods, labor, or skill in a venture or business, upon an agreement to divide the gains or losses between them." *Cooper v. Knox* , 197 Va. 602, 607, 90 S.E. 2d 844, 847 (1956). The Court is not required to accept general legal conclusions pled by a plaintiff in a motion for judgment. As such, the Petitioners have not established sufficient factual allegations to support a finding of a general partnership between Diane Cox Basheer Communities, Inc. and the entity that entered into the contract with the Petitioners for the sale of their home. As there are no direct allegations against Diane Cox Basheer Communities, Inc. for any acts taken by that entity, and the Petitioners have not established sufficient factual support to allege liability based on a partnership, all counts against Diane Cox Basheer Communities, Inc. were properly dismissed.

E. The Petitioners have not Appealed the Court's Rulings on Fraud that are not Based on the Merger Clause

Before the Virginia Supreme Court, the Petitioners focused their argument on the trial Court's ruling on the merger clause. They have ignored the Court's ruling on the other bases for why the claims for fraud were dismissed, and have not challenged those rulings before the Court.

In Counts III through V, the Petitioners claim actions based on fraudulent inducement, actual fraud and constructive fraud. In these allegations Diane Cox Basheer Communities, Inc. is not specifically named.

Counts IV and V are based solely on the allegations that there was a failure to install a radon mitigation system as required under the contract. The allegations in Counts IV and V arise solely from the breach of contract and cannot support an action in tort. *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E. 2d 344, 347 (1998).

Here, the trial court correctly found that many of the alleged allegations of fraud did not involve present statements of fact, but rather involved future transactions. For example, the Petitioners sued for failure to build the house of the same quality as the model, (Amended Motion for Judgment, ¶ 81), and because the yard would not be flat. Both reference future activities. The Petitioners then allege that there were misrepresentations concerning character, style, quality and grades. The Court correctly held that these statements as to quality were not actionable. *See Tate v. Colony House Builders, Inc.*, 257 Va. 78, 508 S.E. 2d 597 (1999). (statements that a new dwelling house was competently designed, commensurate with the price, and

that the design of the construction was of the highest quality were puffery and opinion and could not form the basis for an action for constructive fraud). Similarly, the Court's findings that representations of the parties' rights and legal obligations, such as whether or not the contract could be repudiated, or the parties' rights under a warranty, are statements of law, and cannot form the basis for a claim for fraud. See *Giovanni Mortarino v. Consulting Engineering Services*, 251 Va. 289, 467 S.E. 2d 778 (1996) (fraud cannot be predicated on statements of opinion, and must relate to pre-existing facts, and not unfulfilled promises or statements as to future events.)

In addition to their allegations concerning future contractual obligations, the Court found that the merger clause would apply to these allegations of fraud, and as a result of the application of the merger clause, no liability could be imposed. The Petitioners have not cited any binding authority that the merger clause should not apply to the facts of this case. Even without the merger clause, there could be no claim. Breaches of future promises, or contractual based obligations do not state claims. *Metropolitan Authority v. McDevitt Street Bovis*, 256 Va. 553, 507 S.E. 2d 344 (1998).

Petitioners have not challenged the Court's rulings concerning Counts IV (Actual Fraud) and V (Constructive Fraud). These Counts concern the alleged misrepresentations that a radon remediation system was installed. The duty to install such a system arose out of the duties created by the contract. Where the misrepresentation concerns a duty created by contract, the remedy is a claim for beach of contract, not fraud. "A tort action cannot be based solely on negligent breach of contract." *Richmond Metropolitan Authority v. McDevitt Street Bovis*, 256 Va. 553, 559 307 S.E. 2d 344 (1998).

The decision by the Trial Court was well grounded,

based on Virginia law and precedence. The decision by the Virginia Supreme Court refusing to grant the Petition for Appeal was also well supported by Virginia law. Even if the Petitioners are correct, and the Virginia Supreme Court changed its rule concerning the creation of a partnership by estoppel, that finding does not allow the Petitioners to proceed. The underlying torts, upon which vicarious liability is sought to be imposed have not been challenged on appeal. Simply finding a partnership would provide no relief, since there is no valid claim against any of the partners at this time. Those claims have all been dismissed.

CONCLUSION

For the above reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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(4)

No. 05-693

IN THE

Supreme Court of the United States

STEPHEN V. CRAIG AND UN SUN H. CRAIG, PETITIONERS

v.

DIANE COX BASHEER COMMUNITIES, INC.; EDGEMOORE HOMES, LLC; BASHEER/EDGEMOORE-SOUTHAMPTON, LLC; BASHEER/EDGEMOORE-WESTHAMPTON, LLC; AND BASHEER & EDGEMOORE, A VIRGINIA GENERAL PARTNERSHIP,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR REHEARING

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QUESTION PRESENTED

Did the Virginia state courts deny the petitioners due process of law when they unexpectedly and without fair warning repudiated the petitioners' claims that the respondents, acting in concert, committed fraud and violated the Virginia Consumer Protection Act in the marketing, selling and building of the petitioners' home?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINIONS BELOW

The relevant Opinions and Orders are contained in the petitioners' original petition for certiorari, the denial of which is the subject of this Petition for Rehearing.

JURISDICTION

The Court denied the petitioners' original petition for certiorari on February 21, 2006. This petition for rehearing is filed within 25 days of this Court's denial of the petition for certiorari consistent with the provisions of Supreme Court Rule 44.2.

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

Virginia Code Section 59.1-198:

> ....
> "*Consumer transaction*" means:
> 1. The advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes;
> ....
> "*Goods*" means all real, personal or mixed property, tangible or intangible....

Virginia Code Section 59.1-200:

Prohibited Practices.-----A. The following

fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

.....

2. Misrepresenting the source, sponsorship, approval, or certification of goods and services;

.....

8. Advertising goods or services with intent not to sell them as advertised....

.....

14. Using any other deception, fraud, false pretenses, false promise, or misrepresentation in connection with a consumer transaction:....

STATEMENT

The facts and procedural history of this case are set out in the petitioners' original petition for writ of certiorari, the denial of which is the subject of this Petition for Rehearing.

ARGUMENT

The Virginia State Courts Denied The Petitioners Due Process Of Law When They Unexpectedly And Without Fair Warning Repudiated The Petitioners' Claims That The Respondents, Acting In Concert, In Breach of Express Warranty, Committed Frauds, And Violated The Virginia Consumer Protection Act In The Marketing, Selling And Building Of The Petitioners' Home.

The petitioners request rehearing of the denial of their petition for writ of certiorari (PWC) pursuant to Supreme Court Rule 44.2. This request is made because in their original petition, the petitioners for the sake of brevity,

focused only on the Virginia state courts' inexplicable and unexpected repudiation of Virginia Code Section 50-73.98's language recognizing the liability of a partnership created by estoppel as denying them due process of law.

However, left unaddressed by the petitioners' original petition for writ of certiorari was their further claim that the Virginia state courts' denied them due process of law when they inexplicably and without fair warning ruled that none of the respondents, while furthering the partnership business, could be held liable for their Breach of Express Warranty and violations of the Virginia Consumer Protection Act, and/or for their fraudulent, actual, and/or constructive fraud when they fraudulently, willfully, and/or intentionally misled the petitioners about the cost of house (App.11a) and the quality and workmanship of their home; then failed delivering the quality of home the petitioners paid for (APP.10a-15a) and failed to install the Radon mitigation system as promised (App.5a&5b), affirmatively concealing this fact (App.19-20;58-60) from the petitioners knowing how harmful this may be to any human beings.

B&E also intentionally made misleading statements that petitioners could not repudiate the agreement after certain lots were made unavailable to them or when certain models could not be built; that their lot would be flat and private when in fact it was sloped and lacked privacy (App.16a&17a); that utility lines would be buried when in fact they were installed above ground; that it operated without a contractor's license (App. 28-30); when it prematurely delivered the home to the petitioners two months before it was finished (App. 37).

The petitioners believe that the above claims are important enough to warrant the grant of their Petition for Rehearing, not just only for them but for other consumers similarly situated and may make transactions for construction of their homes, rely on the partnership and other advertisements made by B&E to the public (App. 6a-8a), like the petitioners.

The petitioners paid at least $115,833 more because the B&E operated the business without license in the public and the B&E gave incorrect cost to the petitioners. The petitioners actually signed to the contract to purchase a used (less than one year old) B&E Ashmont model (the Alternative) from the home owner for $500,000 **on 9 May 2000** (APP. 16a) but offered the price reduction to $495,000 (APP. 3&4) when the petitioners withdrew their contract to purchase their home from B&E. B&E also provided incorrect cost to at least one of their neighbors. The petitioners signed B&E's contract **on 20 May 2000.**

In the first place, the petitioners alleged that the Virginia general partnership known as the respondent Basheer and Edgemoore ("B&E") advertised and marketed itself and its four other respondent partners as specialists in the construction, sales and financing of luxury residential homes in suburban Virginia.. They asserted that B&E violated the Express Warranty and, the Virginia Consumer Protection Act (Va. Code Sections 59.1-196 *et seq.*) when it intentionally misrepresented the petitioners' rights under the Home Warranty, refused to perform work called for thereunder, required the petitioners to waive their rights under the Warranty, refused to repair the petitioners' listing of defects, and refused to conduct a final walk-through inspection without insisting on a waiver of petitioners' rights(App. 18-19;62). The result was a Home Warranty which had no value.

Consistent with the Breach of Express Warranty, the petitioners under Count I ask an award of damages against B&E and other Defendants, except B&E/Southampton LLC. The petitioners dismissed the case against the LLC due to expenses that would occurring for expert witness and trial including attorney's fee that may cost at least $15,000, but the Warranty was not worth more than $1,000, and the LLC has lack of resources, if any to repair defects, etc.

Consistent with the Consumer Protection Act, the petitioners under Count II asked for an award of damages to compensate them for the difference in value between the home B&E

promised and the home it actually delivered and for the money they spent in attempting repairs in order to put the home in the condition B&E represented it would be in at the time of closing(App. 20-21). In addition, for each violation of the Act, they sought an award of the greater of $1,000 or three times their actual damages incurred together with their attorney's fees and costs(App. 21).

In Count III, the petitioners relied upon all of these material misrepresentations by B&E to allege that but for this fraud, B&E would not have been able to make the sale(App. 21-24). They sought compensatory damages and $350,000 in punitive damages from all the respondents for this fraudulent inducement(App. 24). The petitioners further claimed in Count IV and V that all of the respondents committed actual and/or constructive fraud when they failed to install a Radon mitigation system as promised and then concealed this fact from the petitioners with measured Radon levels four times the maximum allowable safe levels as established by the EPA(App. 24-28). As a result of B&E's actual and/or constructive fraud, the petitioners have been forced to live in a home with unsafe levels of Radon, were denied the use and enjoyment of a substantial portion of their home, sustained severe emotional and mental distress, suffered monetary losses caused by installing a Radon mitigation system themselves with Mrs. Craig suffering physical injury in the course of making these repairs as well as a precancerous growth requiring surgery and a noticeable loss of hair(App. 26;28;57). They sought compensatory damages in the amount of $500,000, punitive damages of $350,000 and their costs, expenses and attorney's fees(App. 26;28).

Despite established law that upon demurrer such allegations are taken as true and read with every deference to the petitioners, *Ward's Equip. v. New Holland North Am.*, 493 S.E.2d 516, 518(Va.1997), the Virginia courts inexplicably sustained the demurrers of the respondents to Count II's allegations of violations of the Consumer

Protection Act because the petitioners' allegations were not specific enough, disregarding the petitioners' two letters (App. 16a &17a) sent to the B&E identifying specific defects, especially for yard slopes; also provided at least two inspection reports performed by certified home inspectors (App. 32a, PWC). The B&E and other respondents also know the degree of code-violated yard slopes because they spent over 30 minutes in the petitioners' yards in the previous day they made the hearing on the motion. In addition, they ruled that paragraph 19's merger clause in the agreement bars relief for fraud since the petitioners acknowledged therein that they had not relied upon any other representations outside of the contract. The petitioners were actually relied on the B&E's advertisements, their brochures, and their correspondence before, during, and after signing of the contract as stated above.

One of the brochures that B& E provided to the petitioners before and was available during and after the signing of the contract states **"Basheer & Edgemore is a Partnership of Diane Cox Basheer Communities and Edgemoore Homes, offering over 40 years of experience ... With over 5,000 homes...."** (App. 6a-8a). At least three letters and one of the envelopes that the B&E sent to the petitioners also states as ***"A Partnership of Diane Cox Basheer Communities And Edgemoore Homes"*** (App. 3a, 3b, 3c).

As for the respondents' actual and constructive fraud claims under Counts IV and V, the Virginia courts ruled that there was no causal connection between the alleged fraud and the severe emotional and mental distress suffered by Mrs. Craig in spite of the physical injury she sustained in the course of making repairs. Mrs. Craig had severe allergic reactions, a precancerous growth which required surgery, a persistent cough for almost two years and a noticeable loss of hair(App. 57) and other problems as stated the above.

In sustaining the demurrers, the Virginia courts have employed an unforeseen reading of Virginia Consumer

Protection Act and their own decisions on fraud and constructive fraud. This unfair reading of the petitioners' complaint is "indefensible by reference to the law which had been expressed prior to the conduct in issue,"*Bouie v. City of Columbia*, 378 U.S. 347, 354(1964); and it is so far beyond what a "fair reading" of the Virginia Consumer Protection Act and the relevant decisional law would permit as to constitute a denial of due process of law. *Id.* at 354-355.

The Fraud Counts. By its home models, advertisements, correspondence and dealings with the petitioners, B&E in order to make the sale promised the petitioners before and after they executed the contract that their home would be habitable, constructed in a workmanlike manner and free of defects(App. 53-56;66). Instead, their home was none of these things. It was unsafely and defectively built; it had unsafe levels of Radon; and the petitioners have been denied the use and enjoyment of a substantial portion of their home, have sustained severe emotional and mental distress, have suffered monetary losses caused by installing a Radon mitigation system themselves with Mrs. Craig suffering physical injury including a precancerous growth requiring surgery and a noticeable loss of hair (App. 26;28;57-60;64-65). The petitioners' expense occurred over **$156,149.35** for attorneys' fee, home inspection reports, printing jobs, and filling fees for the Courts, not including repair costs that they already paid and would occur to receive justice.

In Virginia, a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of opinion. *Mortarino v. Consult-ant Eng'g Servs.*, 467 S.E.2d 778, 781(1996). *Saxby v. Southern Land Co.*, 63 S.E. 423, 424 (1909). Additionally, "fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *Patrick v. Summers*, 369 S.E.2d 162, 164(1988) quoting *Soble v. Herman*, 9 S.E.2d 459, 464(1940). However, when B&E through its home models, advertisements, brochures,